Reflecting the complete integration of their former businesses, the profits Shell or Texaco could earn from the entities no longer depended on the quantity of any specific brand the entities sold. Instead, Shell's and Texaco's gains or losses depended on the overall profitability of the entities, and were divided in proportion to the assets each company contributed at formation. JA 76 (¶ 43), 77 (¶ 47). Thus, neither Shell nor Texaco had a specific interest in the price charged for any particular brand sold by the ventures. At some point after their formation, the entities began to charge the same price in any trade area for both Shell-branded and Texaco-branded gasoline. JA 131 (¶ 63).

The Federal Trade Commission and the attorneys general of four western states comprehensively reviewed the transaction for compliance with the antitrust laws. JA 116-17 (¶¶ 26-28). Recognizing that the ventures would operate as a single entity in the relevant markets, the FTC evaluated the ventures' formation "as if it were a complete merger" using the same standard the FTC applies when evaluating mergers.[4] It identified competitive concerns in certain markets and required that Shell and Texaco agree to divest certain assets to remedy those concerns. The parties entered a consent decree embodying these divestiture requirements—a consent decree that the FTC concluded

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[4] *See, e.g., In re Shell Oil Co.*, 125 F.T.C. 769, 774, 775, 776, 777 (1998) (recognizing that formation of the ventures would "eliminate direct competition" between Shell and Texaco); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, 67,871 (1997) (observing that Equilon's formation "will reduce the six competitors to five"); *In re Chevron Corp.*, 2002 WL 10629 (F.T.C. Jan. 2, 2002) (Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson) ("[T]he Commission evaluated the formation of the Alliance as if it were a complete merger of the downstream operations of Texaco and Shell. . . . In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration.").

"alleviate[d] the alleged competitive concerns arising from the Joint Venture." FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, 67,869 (1997). Similar consent decrees were entered with the four investigating states. JA 117 (¶ 28). Consistent with the nature of the ventures as fully integrated entities that would market gasoline as well as produce it, none of the consent decrees imposed any restraint on the ventures' pricing of the Shell and Texaco brands.

B. This Lawsuit

In 1999, service station dealers who bought gasoline from Equilon filed this lawsuit under Section 1 of the Sherman Act. Without challenging Equilon's legitimacy or its right to produce and sell gasoline, the plaintiffs alleged that it was *per se* illegal price-fixing for Equilon to charge the same price for the Shell brand as for the Texaco brand.[5] The plaintiffs (understandably) disavowed any attempt to prove a violation of Section 1 under a "rule of reason" analysis, Pet. App. 7a, 47a, which would have required that they demonstrate that Equilon's pricing decision actually had anticompetitive effects in some relevant market. Instead, they sought to prevail solely on the basis that Equilon's pricing of its own gasoline could be held unlawful without any analysis of its actual competitive impact.

The district court granted the defendants' motion for summary judgment. The court concluded that Equilon was bona fide and could not reasonably be viewed as a sham designed to disguise an ulterior anticompetitive purpose. *Id.* at 54a-66a. The district court further ruled that it did not violate the antitrust laws for this bona fide entity to price its own products "[l]ike any other business." *Id.* at 63a. The

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[5] The plaintiffs asserted a similar claim against Motiva, but the district court dismissed that claim, and the Ninth Circuit affirmed, because none of the plaintiffs had purchased from Motiva. *See* Pet. App. 34a-45a; *id.* at 10a-12a. The only claims at issue therefore relate to Equilon.

court found it irrelevant that Equilon charged the same price for the Shell and Texaco brands. As the court explained: "Whether Equilon and Motiva charge the same or different prices for both brands, each literally 'fixes' a price where [Shell and Texaco] formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell." *Id.* at 52a-53a. A ruling that it is illegal for a joint venture to fix the prices of its various brands would "act as a *per se* rule against joint ventures between companies that produce competing products." *Id.* at 54a.

C. The Ninth Circuit's Divided Decision

In a split decision, the Ninth Circuit reversed. The majority (Reinhardt and Rawlinson, JJ.) held that Equilon's decision to charge the same price for the Shell and Texaco brands was *per se* illegal unless the defendants could show that that particular pricing decision was "reasonably necessary" to achieve the anticipated efficiencies that led to Equilon's creation. Pet. App. 21a.

The majority acknowledged that, "for some purposes at least," joint ventures that consist of a true pooling of assets and sharing of risks are to be considered "'single firms competing with other sellers in the market.'" Pet. App. 16a (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982)). The majority further acknowledged that Equilon involved such a "collective assumption of risk and resource pooling." Pet. App. 5a. But the majority concluded that Equilon's integrated nature did not prevent applying Section 1 to Equilon's pricing of its own products because Shell and Texaco had supposedly agreed "in advance" that, once Equilon was formed, it would charge the same price for each brand. *Id.* at 19a n.11. To the majority, this meant that the pricing decision "was not a decision made by a single economic entity—it was a decision made by competitors." *Id.*

Applying Section 1, the majority concluded that the legality of Equilon's pricing depended on whether "setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors . . . is reasonably necessary to further the aims of the joint venture." *Id.* at 21a. If not, the court held, it could be deemed naked price-fixing, and thus *per se* illegal.

Applying its narrow focus on Equilon's actual pricing strategy, the majority concluded that the evidence did not establish the requisite necessity because, in the court's view, the defendants did not view setting the same price for the two brands as critical to the efficiencies and anticipated cost savings from Equilon's creation. *Id.* at 23a. The court rejected the argument that businesses must have the freedom to choose the prices at which they will sell their products without being second-guessed by the courts. It asserted that that argument "proves too much" because it would permit companies to "create joint ventures as fronts for price-fixing"—although the court did not suggest that Equilon was a sham or anything other than a bona fide single entity merely pricing the products it produced, owned and sold. *Id.* at 26a. The majority dismissed as irrelevant whether Equilon's pricing strategy had any actual competitive consequences. Having labeled Equilon's price-setting as "price-fixing," the majority held that the *per se* rule forbids any such inquiry.

Judge Fernandez dissented. He began with the undisputed premise that there was "no doubt that each of the new entities is a true, bona fide, economically integrated joint venture." *Id.* at 29a. He concluded that "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products." *Id.* at 31a-32a. Judge Fernandez rejected the majority's assertion that liability depended on whether the defendants could show that

Equilon's specific pricing strategy was "essential [or] 'reasonably ancillary to the legitimate cooperative aspects of the venture.'" *Id.* at 31a (citation omitted). Instead, it was enough that Equilon needed "to price its own goods." *Id.* at 32a. As he stated, "[w]hat could be more integral to the running of a business than setting a price for its goods and services?" *Id.* Because Equilon was thus a "separate entity" entitled to price its own products, it was irrelevant that it "decided to price them the same, as any other entity could." *Id.* at 31a, 32a. The result of the majority's ruling, Judge Fernandez concluded, was that bona fide joint ventures would be subject "to the severe sting of antitrust liability" simply for conducting themselves on the same basis as any other "true business." *Id.* at 32a.

SUMMARY OF ARGUMENT

1. The decision below is plainly wrong. Section 1 of the Sherman Act reaches only concerted action between separate entities. It does not reach the conduct of a single firm. Here, Equilon was a legitimately formed and valid venture between Shell and Texaco. Its formation eliminated all competition between them in the relevant market. As a result, Equilon's operation of its own business does not constitute the "sudden joining of independent sources of economic power" about which Section 1 is concerned. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

Equilon's *formation* was such a joining of independent resources to which Section 1 (and Section 7 of the Clayton Act) surely applied. And that formation was carefully reviewed and approved by the FTC and several states. But once Equilon was legitimately formed, Equilon's conduct—regardless of whether decided upon by its owners, managing committee, or the individuals appointed to operate the business on a day-to-day basis—was single firm conduct not subject to Section 1. This Court's decisions, lower court decisions and the leading antitrust commentators agree.

Any other rule would be nonsensical, seriously disruptive at a minimum, and a significant deterrent to the procompetitive formation of efficiency-enhancing businesses. It would require courts to substitute their own managerial judgements for those of the firm's owners on essentially every aspect of the venture's operation. Avoiding this kind of judicial second-guessing of a company's daily operation was a principal reason behind Congress' decision to restrict Section 1's application to concerted action of separate entities. The Ninth Circuit's ruling subverts that fundamental purpose.

Recognizing Equilon's status as a single firm would not immunize joint ventures from antitrust scrutiny. Agreements to form a venture, and any accompanying restraints on non-venture conduct, would remain fully subject to antitrust review. Similarly, joint ventures are subject to the same restrictions as any other business, including scrutiny under Section 1 for any concerted action with other entities and under Section 2 for monopolization or attempted monopolization. Here, no such issues are presented. No challenge is made to Equilon's formation or to any restraints on non-venture conduct. The only issue is Equilon's operation of its own validly formed business, which is not subject to Section 1.

2. Even if Section 1 were applicable, it is inconceivable that Equilon's pricing of its own product could be condemned as *per se* illegal. The rule of reason is the presumptive standard under Section 1 and the exception to that standard—the *per se* rule—is reserved for restraints that have been shown by considerable experience to be plainly anticompetitive and without any redeeming value.

A legitimate joint venture's pricing of its own product cannot possibly meet that standard. Even where (unlike this case) the companies forming a joint venture continue to separately compete in the relevant market, this Court has repeatedly rejected application of the *per se* rule to restraints

that accompany a valid, efficiency-enhancing joint venture. Here, where Shell and Texaco were no longer competitors in the relevant market and thus no agreement between them as to Equilon's prices could possibly have restricted competition, the notion that the *per se* rule could be proper is incomprehensible.

The ancillary restraints doctrine on which the Ninth Circuit relied is irrelevant here. That doctrine was developed to address agreements that restrain the venture participants' conduct *outside* of the venture. It has not been—and should not be—applied to subject to separate antitrust scrutiny every operational aspect of the venture's *own* business. The purpose of the doctrine is to ensure that venture participants do not use the venture as an excuse for restraining competition that would otherwise continue to exist between them. Here, the formation of the venture itself had already ended all competition in the relevant market between Shell and Texaco, so there was no otherwise independent competition that possibly could have been restrained.

Moreover, even if the ancillary restraints doctrine were applicable here, it was satisfied. As a legitimate business formed to produce and sell its own gasoline, Equilon had to set a price for that gasoline. The need for it to do so was sufficient to satisfy any standard of necessity under the ancillary restraints doctrine.

The Ninth Circuit badly misapplied basic antitrust principles to reach an unsupportable result. Because legitimate joint ventures are a critically important form of business organization in the modern world, this Court should make clear that, once properly and legitimately formed, their day-to-day business operations will not be subject to the kind of frivolous legal attack the Ninth Circuit endorsed in the decision below.

ARGUMENT

I. A JOINT VENTURE ENTITY'S OPERATION OF ITS OWN BUSINESS IS SINGLE FIRM CONDUCT THAT IS NOT SUBJECT TO SECTION 1 OF THE SHERMAN ACT.

A. This Court And Others Have Recognized That An Integrated Joint Venture Is Regarded As A Single Firm When Conducting Its Own Business.

The threshold question in any case under the Sherman Act is whether the conduct in question is that of a single firm or multiple firms. That is because "[t]he Sherman Act contains a basic distinction between concerted and independent action." *Copperweld*, 467 U.S. at 767 (internal quotation marks omitted). Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination ... or conspiracy' between *separate* entities." *Id.* at 768 (quoting 15 U.S.C. § 1) (emphasis in original). It does not reach "[t]he conduct of a single firm," which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Id.* at 767.

This more exacting standard for concerted action reflects Congress' judgment that concerted action carries greater competitive risk because it "represent[s] a sudden joining of two independent sources of economic power previously pursuing separate interests"—a "merging[] of resources" that "increases the economic power moving in one particular direction." *Id.* at 769, 771. By contrast, decisions within a single firm do not represent such a "merging[] of resources" and are not subject to Section 1 scrutiny, thus leaving companies free to vigorously compete without having their "every action [subjected] to judicial scrutiny for reasonableness." *Id.* at 775.

There is no question that the decision of two companies to form a joint venture is a "merging of resources" to which Section 1 applies (along with Section 7 of the Clayton Act, 15 U.S.C. § 18), just as Section 1 (and Section 7) would

apply to a complete merger of two previously independent companies. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) (analyzing under Section 1, and under Section 7 of the Clayton Act, the formation of a joint venture to build a chemical plant); *accord* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 318 (2d ed. 2003) ("A venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Section 1 of the Sherman Act.").

Similarly, if members of a joint venture agree to restrictions on their own activities outside of the venture or to other similar collateral restraints, the courts have recognized that Section 1 would apply to any such agreement. *See, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (applying Section 1 to judge validity of rules prohibiting Visa member banks from issuing cards of other credit card companies), *cert. denied*, 125 S. Ct. 45 (2004).

Neither circumstance is present here. The Ninth Circuit did not suggest that Equilon's formation violated Section 1. That formation decision was the subject of extensive antitrust review by the FTC and the state attorneys general, who found Equilon's formation to be lawful, conditioned on certain divestitures. *See supra*, pp. 4-5. Nor do plaintiffs challenge any collateral restraints entered into in connection with the venture. The pricing strategy at issue here applied only to Equilon's output.

Instead, plaintiffs attack the operation of Equilon's own separate business—*i.e.*, establishing a price for the products it sells. The Ninth Circuit's ruling that this could be considered concerted action is erroneous. This Court recognized in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the

market." *Id.* at 356. Thus, in such a cooperative venture, "a price-fixing agreement among the [partners] would be perfectly proper." *Id.* at 357.

This recognition of the right of an integrated venture (or its owners) to set the price of the venture's own product applies fully here. Equilon was a complete merger of the relevant businesses of the companies involved. This effective merger ended all competition in the relevant market between the founding companies, who are now in the position of shareholders of the new business. With respect to that business, the owners had a "complete unity of interest," *Copperweld*, 467 U.S. at 771, because the business' profits were divided based on the share of ownership of the business, rather than the sale of any particular brand. As Judge Fernandez correctly recognized below, as a "separate entity," Equilon was entitled to select the price for its own product "as any other entity could." Pet. App. 31a, 32a.[6]

The leading antitrust treatise makes the point clearly: where joint enterprises "are buying and selling in their own right, they can fairly be regarded as single entities whose

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[6] *See also Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities"); *Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative as a purported conspiracy among its members); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 616 (6th Cir. 1990) (recognizing that Section 1 should not apply to decisions of "former competitors operating a joint venture which competes in the market with other sellers"); *Addamax Corp. v. Open Software Foundation*, 152 F.3d 48, 52 (1st Cir. 1998) (questioning how far the theory that "the operations of the joint venture represent collaboration of the separate entities that own or control it . . . can be pressed in the case of a truly integrated enterprise whose 'owners' were no more than stockholders").

selling decisions are not 'price-fixing conspiracies' and whose buying decisions are not 'boycott conspiracies.'" VII *Antitrust Law* ¶ 1477, at 316. Thus, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy." *Id.* ¶ 1478, at 325.

Other commentators agree:

> When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity. Hence, a joint venture acts as a single entity when it purchases inputs from third parties or sets a price or output for sale to third parties of a product not sold to participants.

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 704-05 (1998) (footnotes omitted).

Treating Equilon's operation as that of a single firm is also consistent with the approach of the Federal Trade Commission and the Department of Justice in their *Antitrust Guidelines for Collaborations Among Competitors.*[7] Those guidelines recognize that competitor collaborations should be analyzed under the same standards as a merger (which do not subject the merged entity's operation to Section 1 scrutiny) where the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market, ends all competition between the participants in that market, and lasts for a sufficiently long period. *Id.* § 1.3. The formation of Equilon falls squarely within this description. As noted above, p. 4 & n. 4, the FTC treated Equilon's formation as a merger when it conducted its

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[7] 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) [hereinafter *Guidelines*].

review. And the *Guidelines* themselves use an example that is based on Equilon to illustrate a venture that should be treated as a merger. *Id.* Appendix, Example 1.[8]

B. Sound Antitrust Principles Support Recognizing Equilon As A Single Firm When It Is Operating Its Own Business.

Recognizing Equilon's status as a separate single entity when it sets the price for its own gasoline is consistent with basic antitrust principles and common sense. Section 1 is concerned with concerted action because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. Conspiracies among such independent entities "increase market power or make possible a restraint that could not otherwise be achieved." VII *Antitrust Law* ¶ 1462b, at 194. That is not the situation here. No "independent centers of decisionmaking" existed with respect to Equilon's pricing decisions, because Equilon's owners had validly and completely ended competition between them within the United States and thus had a complete unity of interest with respect to such decisions. The "sudden joining of two independent sources of economic power previously pursuing separate interests" to which Section 1 applies, *Copperweld*, 467 U.S. at 771, occurred when Equilon was

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[8] *See also* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vanderbilt L. Rev. 1753, 1787-88 (1994) ("A merger analysis is appropriate when the parties have integrated all of their existing production or marketing operations in a joint venture. Such integrations eliminate all competition between the parties in the relevant market. As in a merger, a single entity (the joint venture) takes the place of the former competitors in the market. These arrangements have the same economic impact as an acquisition of one partner's business by the other, and thus they should be analyzed in the same manner.").

formed, not when it later conducted its validly formed business.

Nor did Equilon's pricing decisions increase any market power beyond that already validly existing or impose any new restraint. The pricing decisions at issue related only to Equilon's own products and not to any separate products of Shell or Texaco. Indeed, because Shell and Texaco had exited the relevant market, there were no separate products of those companies to which the pricing decisions could apply. All that occurred here was a decision regarding Equilon's own internal business. Such "[c]oordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint" in violation of Section 1. VII *Antitrust Law* ¶ 1462b, at 194.

Once the formation of a venture is reviewed and found valid under the antitrust laws, no legitimate purpose is served by separately scrutinizing each of the venture's operational decisions. Where (as here) the venture is formed to both produce and sell its own gasoline, antitrust scrutiny of the venture's formation necessarily includes considering whether competition may be harmed by the exercise of that pricing power. The antitrust regulators and the courts (if the formation is challenged) evaluate the degree of market power the combined entity will hold and its ability to affect prices. *See supra,* pp. 4-5. In this case, that review resulted in the regulators requiring that the owners divest certain assets in markets where the regulators concluded that the combined entity's unified operation could produce anticompetitive results. *Id.* That review having been completed, and no challenge now being made to Equilon's formation as a production *and* marketing venture, no antitrust purpose is served by subjecting to separate antitrust scrutiny Equilon's exercise of the operational decision-making power inherent in its valid formation. The conduct here was the competitive equivalent of General Motors (itself the product of various business combinations in the past) deciding to set the same price for its Chevrolet Malibu and Pontiac Grand Am. No

one would seriously suggest that GM's pricing decisions should be analyzed as an ongoing conspiracy between its previously independent parts. No reason exists for any different rule here.[9]

In addition to not furthering any valid antitrust purpose, applying Section 1 to an integrated venture's ongoing operation is simply unworkable. Under the Ninth Circuit's rule, virtually every operational decision of any joint venture would be subject to antitrust scrutiny, including such routine (and necessary) decisions as what or how much to produce, or what supplies to purchase and from whom. Courts and juries would be called upon to "substitute their managerial judgments for those of the firm" and engage in "inconvenient, if not impossible, judicial review of the venture's day-to-day operations at the suit of disappointed suppliers and others." VII *Antitrust Law* ¶ 1478c, at 325, 326. *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (recognizing that courts are "ill-suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing" of a single firm).

The Ninth Circuit's analysis here illustrates the problem. In concluding that Equilon's pricing decisions could be found illegal, the court asserted that "[n]ormally" businesses

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[9] *See, e.g.*, W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful*, 19 Antitrust 52, 55 (Spring 2005) ("When a court evaluates the lawfulness of a legitimate horizontal joint venture under the rule of reason, it is necessarily evaluating whether the consolidation of the price-setting functions of former rivals lessens competition. There is no reason for the courts to then evaluate this question a second time, viewing the consolidation of the price-setting functions as a separate restraint of trade . . . ."); VII *Antitrust Law* ¶ 1478b1, at 320 ("because it would be senseless for antitrust law to take away with one hand what it gives with the other, approval [of a venture's formation] means that the subsequent realization of that which was foreseeable and judged reasonable at the time of creation must also be legal").

will consider a variety of factors in pricing their products and that it "seems likely" that an "independent" analysis would result in a "rational decision to sell the different brands at different prices." Pet. App. 23a. How a court could believe itself competent even to engage in such analysis, or on what basis it could reach such a conclusion, is hard to fathom. If this is illustrative of the kind of second-guessing by antitrust courts or lay juries that the Ninth Circuit's approach would dictate—with respect to not just pricing decisions but every other daily operational decision of the venture—the likely result would be the end of the joint venture as a useful method of business organization.[10]

This Court in *Copperweld* recognized that one of the "eminently sound reasons" for limiting Section 1 to concerted action is to avoid "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness." 467 U.S. at 775. It is hard to imagine a more perfect example of that concern come to life than the Ninth Circuit's decision, which invites after-the-fact antitrust review of the myriad purchasing and selling decisions inherent in a legitimate joint venture's operation of its own business. To avoid enmeshing the courts in a function for which they are ill-suited, and to

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[10] The Ninth Circuit similarly dismissed Equilon's concern that selling its brands at different prices might be found to violate the Robinson-Patman Act. The court asserted that the Act is "unquestionably . . . inapplicable" because the brands have different additive packages and were marketed differently. Pet. App. 25a. Perhaps the Ninth Circuit majority did not have the advantage of a complete understanding of the complicated history of Robinson-Patman Act jurisprudence. If it had, it would have understood that, at the time Equilon made its pricing decision, it did not have the luxury of the Ninth Circuit's certainty. *See FTC v. Borden Co.*, 383 U.S. 637 (1966) (holding that products are not differentiated for Robinson-Patman Act purposes by separate brand identities); *In re Standard Oil Co.*, 49 F.T.C. 923, 952 (1953) ("chemical analysis" is not the "important competitive factor" in retail gasoline distribution).

avoid the accompanying risk of defeating the very procompetitive benefits for which companies legitimately create joint ventures, a bona fide joint venture's operation of its own separate business should be treated as single firm conduct. As Professors Areeda and Hovenkamp have recognized, once a joint venture is itself permitted, its "function will be performed most efficiently by an organization that can operate with the same legal freedoms as the ordinary business entity." VII *Antitrust Law* ¶ 1478c, at 326.

For similar reasons, the Ninth Circuit's ruling also raises serious remedial issues. One of the reasons for subjecting concerted action to closer scrutiny is that "*concerted* action . . . is amenable to a remedy that does not require judicial estimation of free-market forces." *Trinko*, 540 U.S. at 410 n.3 (emphasis in original). "Conspiracies among unrelated entities are relatively infrequent, easily appraised for reasonableness and simply remedied through prohibition." VII *Antitrust Law* ¶ 1402, at 8. None of these characteristics describe an integrated venture's operation of its own business. Nor is it possible to imagine a simple remedy for any conduct a court might deem inappropriate. To deny a production and marketing venture the power to price and sell its own product is effectively to deny its ability to exist. Indeed, the effect would be to frustrate the very formation of the venture—a venture that in this case both courts below recognized is a bona fide efficiency-enhancing endeavor. Pet. App. 4a (noting the "voluminous record documenting the economic justifications" for the venture), 50a ("the undisputed evidence shows potential and realized efficiencies occurring within functioning and integrated enterprises"). As Judge Fernandez colorfully described it below, the Ninth Circuit majority's ruling creates an "exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business—sets prices for its own goods—it subjects its otherwise insulated members to the severe sting of antitrust liability." *Id.* at 32a.

Recognizing Equilon as a single entity is fully consistent with this Court's cases analyzing certain joint venture conduct under Section 1. In each of those cases, unlike the present case, the venture's owners remained competitors in the relevant market and the restraint at issue related to the subject of that continuing competition. Thus, in *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), the composers and other copyright owners who joined together to offer a blanket license for their copyrighted works did not fully integrate and end competition between them. The venture members each continued to produce and own their own copyrighted works and "retain[ed] the rights individually to license" those works. *Id.* at 11. The Court thus concluded that the defendant organizations "plainly involve[d] concerted action in a large and active line of commerce." *Id.* at 10. Similarly, in *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), the members of the NCAA remained competitors in the market for college football games and the challenged restraint restricted that competition by "limit[ing] members' freedom to negotiate and enter into their own television contracts." *Id.* at 98. The Court thus concluded that the "NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with each other." *Id.* at 99. Equilon's pricing decisions do not constitute any such agreement among competitors about how they will compete. Equilon's owners do not compete against each other in any relevant market. The pricing decisions relate solely to Equilon's validly created, separate business.[11]

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[11] This Court's other joint venture cases similarly involved restraints that related to continuing non-venture competition among the members. *See also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (applying Section 1 to dental association rule prohibiting individual members from submitting x-rays to insurers); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (applying

As this Court's cases demonstrate, treating an integrated joint venture as a single entity when it operates its own business does not mean that, once formed, a joint venture is immune from the antitrust laws. Where venture owners agree to restraints on their non-venture conduct, such collateral restraints remain subject to antitrust scrutiny. Thus, for example, if Shell and Texaco had agreed when forming Equilon or thereafter upon the pricing or output of products outside of the venture as to which those two companies continued to compete, that agreement would be subject to Section 1. *See* XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2122b, at 132 (2d ed. 2005) (recognizing that a joint venture might threaten competition if it "eliminate[s] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' nonventure business . . . ."). No such claim is asserted here. Similarly, the venture's operation of its own business is subject to antitrust scrutiny on the same basis as any other single company would be, including scrutiny under Section 1 for any concerted action with other entities and under Section 2 for monopolization or attempted monopolization.

The decision below should be reversed not just because it is clearly wrong, but because the proper resolution of these issues has broad practical ramifications. Joint ventures are present in nearly every sector of business and are an increasingly important source of economic growth. *See* Jon G. Shepherd, Editor's Note, *Symposium: Antitrust Scrutiny*

Section 1 to decision of members of a purchasing cooperative to expel a competing retailer); *Maricopa County*, 457 U.S. at 356 ("Each of the foundations is composed of individual practitioners who compete with one another for patients."); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (applying Section 1 to professional association's restriction on competitive bidding by its members).

of Joint Ventures, 66 Antitrust L.J. 641, 641 (1998); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139 (2001). As observed by leading antitrust commentators, "the legal and economic literature on joint ventures is largely favorable toward them, and antitrust generally begins its analysis with a presumption of legality." XIII *Antitrust Law* ¶ 2121b, at 117-18. The *Collaboration Guidelines* similarly recognize that competitor collaborations "often are not only benign but procompetitive." *Guidelines*, Preamble. They can produce real consumer benefits because "[c]ooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production." *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985). It is therefore critical that judicial and regulatory enforcement not foster "a perception that antitrust laws are skeptical about" such collaboration and thereby deter its development. *Guidelines*, Preamble.[12]

Unless the Ninth Circuit's misguided decision is overruled, and this Court clearly states that legitimate joint ventures cannot be subject to this kind of meritless attack, we

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[12] To the extent the Ninth Circuit's decision does not deter the formation of joint ventures altogether, it may have the perverse effect of encouraging companies seeking to create efficiencies to eliminate competition to an even greater degree by fully merging all of their operations. The antitrust laws should not be applied in a manner that produces such a skewed result. *Cf.* Carl Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. Econ. Perspectives 113, 119 (1990) ("If the *per se* rule were applied to joint ventures, a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition."); *Trinko*, 540 U.S. at 414 (cautioning that courts should avoid mistaken application of the antitrust laws that "chill[s] the very conduct the antitrust laws are designed to protect") (internal quotation marks omitted).

will undoubtedly see more needless litigation and, quite likely, a severe reduction or elimination of the use of the joint venture mechanism as a tool to solve business problems. As one commentator observed, in language that presaged the present case, "[t]reating joint ventures as single entities for limited purposes allows meritless group-boycott and price-fixing claims, which could be erroneously decided under the *per se* rule, to be rejected as a matter of law." Werden, *supra*, at 705 n.18. This Court should make clear that this is the proper legal standard.

C. The Ninth Circuit's Reasons For Treating Equilon's Daily Operation As An Ongoing Conspiracy Are Groundless.

The Ninth Circuit sought to justify its contrary result on the ground that there is a "triable issue of fact" as to whether Shell and Texaco had agreed upon the pricing strategy "in advance" when negotiating Equilon's formation, as opposed to after Equilon formally came into existence. Pet. App. 19a n.11. But even if this factual point were legitimately disputed, it is completely irrelevant. The decision at issue here was how to price the venture's products after the venture began operation. Whether that decision was made by the venturers at the time they negotiated the creation of the venture, or by the venturers after the venture was formed, or by the business managers of the venture who had been delegated that responsibility by the venture's owners, makes no difference to the legal analysis because it has no competitive consequence.

It is common that, in negotiating the formation of a venture, the parties involved will discuss, and frequently agree on, how the venture will operate if and when formed. Indeed, it is commonly necessary to make assumptions about the venture's operations in order to evaluate the business desirability of even entering the venture. In any merger transaction—and this was effectively a merger—the merging parties routinely establish integration teams that make

tentative determinations about how the new, merged entity will operate once the transaction is completed. The notion that these decisions, so long as implemented only after the new entity is in fact formed, could be *per se* legal if the new entity is the result of a formal merger, but potentially *per se* illegal if the new entity is a joint venture, is unsupportable by either antitrust principles or common sense.

For similar reasons, it is irrelevant that Equilon was overseen by a Members Committee comprised of representatives from Shell and Texaco. This was the functional equivalent of a board of directors of a corporation. The owners of any business must oversee the business in some manner, whether directly or by delegation to the business' employees. In modern public corporations, shareholders elect directors, who then appoint and oversee business managers. Here, the two owners of Equilon appointed a Members Committee, which appointed and oversaw business managers. JA 124-25 (¶¶ 52, 55-56). These are competitively identical structures. The fact that there were only two owners of Equilon, as opposed to thousands or millions of shareholders, has no antitrust significance. Where (as in this case) the owners of the venture no longer compete in the relevant market and their oversight or control of the joint venture pertains solely to the venture's operation in that market, the fact that the owners may compete elsewhere in other markets cannot turn an otherwise legitimate business decision into a *per se* violation of Section 1, because such decisions do not involve any "sudden joining of two independent sources of economic power" within the meaning of Section 1. *Copperweld*, 467 U.S. at 771. In the absence of any remaining competition between Shell and Texaco in the relevant market, it is of no consequence to any antitrust policy whether or how they were involved in pricing the product of the company they jointly own.

The Ninth Circuit inexplicably suggested that its "analysis would be different" if Equilon were producing a "new product" or if Shell and Texaco had "merge[d] their current

product lines into one collective brand." Pet. App. 27a. The Ninth Circuit did not explain why Section 1 scrutiny should turn on such distinctions. If any competitive significance attends the fact that a joint venture entity is producing something one or more of its members had previously produced rather than a new product, such significance will be accounted for in evaluating the venture's formation and structure. Once the venture itself is found valid, whether it is producing a new product or an old one is irrelevant to any policy underlying Section 1.[13]

Nor is it conceivably relevant that the combined entity sells its product under two or more brand names rather than one. Application of Section 1 to a producer of consumer products surely cannot turn on whether it sells those products under one brand or several different brands (a practice that is

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[13] A joint venture need not produce a new product to be procompetitive or valid under the antitrust laws. As in this case, joint ventures also enable companies to achieve crucial and procompetitive efficiencies by (among other things) eliminating redundancies, obtaining economies of scale, and facilitating access to complementary resources. *E.g.*, *Northwest Wholesale Stationers*, 472 U.S. at 295 (joint purchasing venture "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice"); *Copperweld*, 467 U.S. at 768 ("[M]ergers, joint ventures and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively."); *NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive"); Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 938 (1993) ("Most joint ventures are created to enable the participants to achieve efficiencies. Joint ventures can enable participants to attain economies of scale or scope, allow participants to share risks that no individual member may be able to undertake alone, facilitate the integration of complementary skills, knowledge, or assets in a new process or product, or facilitate the production of a new product that could not otherwise be produced.").

quite common in many markets), regardless of whether it sets the same price for each or how it reaches its pricing decisions. No different rule should apply to a fully integrated joint venture that chooses to sell its products under multiple brand names rather than one. The Ninth Circuit's contrary conclusion only demonstrates the fallacy of its approach. As one commentator recently observed, under the Ninth Circuit's approach, "discontinuing one brand in favor of the other is perfectly lawful, but continuing to sell both brands at the same price is *per se* unlawful. The court's approach elevates form over substance and loses sight of the goals of antitrust . . . ." Smith, *supra*, at 57.[14]

II. THE NINTH CIRCUIT'S RULING THAT *PER SE* TREATMENT MAY BE APPLIED CONFLICTS WITH THIS COURT'S DECISIONS AND BASIC ANTITRUST PRINCIPLES.

The fact that Section 1 does not apply to the conduct here requires reversal of the Ninth Circuit's ruling and entry of judgment for defendants. But even if a joint venture's operation of its business could be viewed as concerted action that may be evaluated separately from the venture's forma

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[14] The Ninth Circuit also suggested that Section 1 scrutiny is necessary to prevent companies from using joint ventures as "fronts for price-fixing." Pet. App. 26a. But in such a case—demonstrably not this case—the venture or its parents would not be entitled to single firm treatment, which should be reserved for decisions of a validly formed entity acting in its own right to conduct its own separate business. If no such business has been validly formed, or if the restraint at issue concerns something other than the entity conducting its own business, Section 1 may apply. For this reason, the Ninth Circuit's hypothetical of Pepsi and Coca-Cola forming a research joint venture and then using that as a front for fixing the price of soft drinks, Pet. App. 16a, is a straw man. Any such price-fixing would clearly not be part of the research joint venture's business but would merely be a restraint on the members' activities outside the venture and would be fully subject to Section 1 scrutiny.

tion, there is no place in that evaluation for the *per se* rule. This Court's precedents and settled antitrust doctrine require that, if Section 1 applies at all, Equilon's pricing decisions must be reviewed under the rule of reason.

A. This Court's Precedents Reject *Per Se* Treatment For Restraints Of This Type.

The "rule of reason [is] the prevailing standard of analysis" under Section 1. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). "[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V.*, 433 U.S. at 58-59. This is because the *per se* rule functions as a "conclusive presumption" that forecloses any inquiry into whether the restraint actually has any anticompetitive effect or produces any procompetitive benefits. *Maricopa County*, 457 U.S. at 345. Because of its draconian nature, *per se* treatment is reserved for cases in which it can be said confidently that the conduct at issue is "plainly anticompetitive" and likely to have no "redeeming virtue." *BMI*, 441 U.S. at 8. The restraint at issue must be such that its "nature and necessary effect [is] so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692; *Indiana Fed'n of Dentists*, 476 U.S. at 458-59 (noting the Court's reluctance to "extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"). *See also State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and rejecting application of *per se* rule to vertical maximum price-fixing).

Applying this standard, this Court and the lower courts have repeatedly rejected *per se* treatment for conduct that is

part of the operation of a valid joint venture—including activity that outside of that context would have been subject to *per se* condemnation. In *BMI*, the Court held that the rule of reason governed the decision of copyright owners to create an association to offer a blanket license covering their copyrighted music. Even though the association's activity included setting the price for the license, the Court held that *per se* condemnation was not proper because the license "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" achieved by the venture and "a necessary consequence of an aggregate license is that its price must be established." 441 U.S. at 20-21. In explaining the impropriety of *per se* treatment in these circumstances, the Court noted that the question cannot be resolved by labeling the conduct "price fixing." Such "[l]iteralness is overly simplistic and often overbroad." *Id.* at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* This is because

> [n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Id. at 23.

Similarly, in *NCAA*, the Court found *per se* treatment improper for the NCAA's restriction on the number of football games individual teams could televise, even though such an output restriction would "ordinarily [be] condemned as a matter of law under an 'illegal *per se*' approach.'" 468

U.S. at 100. *Per se* treatment was improper because the NCAA's operation as a sponsor of sporting events required a "certain degree of cooperation" among the member schools. *Id.* at 117. The Court likewise rejected *per se* treatment in *Northwest Wholesale Stationers*, after noting that the wholesale purchasing cooperative there "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies." 472 U.S. at 295. The Court relied on the fact that such cooperatives "must establish and enforce reasonable rules in order to function effectively" and that the disclosure rule at issue there "may well provide the cooperative with a needed means of monitoring the creditworthiness of its members." *Id.* at 296.

Following these precedents, the lower courts have similarly rejected *per se* treatment for price-setting decisions made by joint ventures or their members. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (rejecting argument that restrictions on player salaries imposed by Major League Soccer should be treated as a *per se* illegal price-fixing conspiracy among the team operators; "rejection of the *per se* rule is straightforward" because "the extent of real economic integration is obvious"); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (rejecting *per se* treatment for a distribution joint venture's setting of fees paid to retailers; *per se* treatment is limited to the circumstance where the agreement on price is "not part of a larger, legitimate economic venture"); *Nat'l Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592, 602 (11th Cir. 1986) (rejecting *per se* treatment for an agreement among members of the Visa joint venture to charge an interchange fee; "[f]or a payment system like VISA to function, rules must govern the interchange of cardholder's receivables" and the interchange fee "represents one such rule").

Based on these precedents, it should have been obvious that *per se* treatment is improper here. Indeed, this case presents an even stronger circumstance for rejecting the *per se* rule than the foregoing cases. In each of those cases, the

participants in the venture continued as competitors in the relevant market, raising the possibility that operation of the venture could reduce the competition otherwise existing between them. No such possibility exists here. As the Ninth Circuit itself recognized, Equilon's creation "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 5a. Thus, there is no issue here of a price-fixing agreement between companies regarding a product as to which they are in competition. *See BMI*, 441 U.S. at 8 (*per se* rule applies to "agreements among competitors to fix prices on their individual goods and services").

In permitting Equilon to be formed as a production *and* marketing venture, the FTC and the state regulators concluded that (with certain divestitures) Equilon would lack the market power necessary to adversely affect competition in its markets. While that conclusion does not bind this Court as to the ultimate lawfulness of Equilon's activity, it is entitled to significant weight.[15] And it should be given particular (if not dispositive) weight in resolving whether Equilon's exercise of its pricing function may be deemed so patently anticompetitive that the Court can "predict with confidence that the rule of reason will condemn it." *Maricopa County*, 457 U.S. at 344. It is difficult to conceive how the Ninth Circuit majority could make such a prediction, without the benefit of any market analysis, when the expert government regulators, after careful and extensive

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[15] *See BMI*, 441 U.S. at 13 (entry of consent decree is "a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice.") (footnote omitted).

market analysis, had concluded that the entry of a consent decree had "alleviate[d] the alleged competitive concerns arising from the Joint Venture," including concerns that Equilon would have the ability to adversely affect market prices. FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. at 67,869. At the very least, a regulator's prior conclusion that competition will not be harmed by the formation of a marketing joint venture (which inevitably must set the price for its products) should require that a court evaluate all the relevant facts and circumstances before holding unlawful the exercise of the very power the regulators found the venture could permissibly hold.

The impropriety of *per se* treatment here is confirmed by the stark contrast between this case and the cases in which this Court has found *per se* treatment proper for alleged joint venture or associational activity. In each of those cases, the agreement at issue pertained to a subject as to which the defendants remained in competition and therefore as to which the agreement had the effect of restraining competition that had not already validly been eliminated. The Ninth Circuit relied heavily on *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969), which applied the *per se* rule to a newspaper joint venture. That venture, however, was not setting prices for the venture's own product as to which the newspapers had validly ended all competition. Instead, the newspapers had agreed on rates for their separately owned and produced news and editorial content. Similarly, in *Maricopa County*, the Court's express basis for applying the *per se* rule was that (unlike this case) the doctors had *not* "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit" but had agreed as "independent competing entrepreneurs" on the "price at which each will offer *his own services*." 457 U.S. at 356-57 (emphasis added). And in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951), the purported "joint venture" did not involve any efficiency-enhancing integration at all.

Because there remained no competition to restrain, Equilon's pricing decisions obviously cannot be "plainly anticompetitive." *State Oil*, 522 U.S. at 10 (*per se* rule is limited to restraints that have "predictable and pernicious anticompetitive effect"). Indeed, it is impossible to imagine how they could have been anticompetitive at all.[16]

B. The Ninth Circuit's "Necessity" Standard Is Unfounded.

The Ninth Circuit asserted that applying the *per se* rule was appropriate unless Equilon could prove that its pricing decisions were "'necessary' to the legitimate aims of the joint venture." Pet. App. 21a. And it was not enough that it was "necessary" to set some price for its gasoline. According to the Ninth Circuit, to avoid *per se* condemnation, Equilon was required to additionally prove that it was necessary for it to set "one, unified price for both the Texaco and Shell brand of gasoline instead of setting each brand's price independently on the basis of normal market factors." *Id.*

The Ninth Circuit's reasoning was groundless. No antitrust principle supports the notion that a legitimate joint venture must establish the "necessity" of its individual operational decisions to avoid *per se* condemnation—let alone that it must establish the necessity of the particular prices it selects. Any such requirement would wreak havoc on the business of such ventures. The manner in which a

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[16] This same analysis compels rejection of respondents' alternative assertion of liability under a "quick look" theory (a theory that the district court rejected, Pet. App. 68a, and the Ninth Circuit declined to reach, *id.* at 13a n.7). Quick look liability requires that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). That standard is not met here, where the challenged restraint pertained to a product as to which competition already had been validly ended.

firm carries out its daily business is a matter of business judgment, and a decision to sell at a particular price—or in a given quantity, or to a particular customer—is generally no more "necessary" to the venture's efficient operation than selling at some other, slightly different price or quantity or to some different customer. To rest potential *per se* condemnation on *post hoc* speculation about the merits of individual business decisions would allow a whole range of routine business decisions that are not in any way anticompetitive to be placed in the same analytical box as horizontal price fixing or bid rigging. This is nonsensical, and precisely the kind of "formalistic line drawing" divorced from any "demonstrable economic effect" that this Court has previously rejected as a permissible basis for applying the *per se* rule. *Continental T.V.*, 433 U.S. at 58-59.

Rather than investigating whether every operational aspect of a legitimate joint venture can be separately justified as "necessary," the proper approach under this Court's precedents to determining whether the *per se* rule applies is to ask whether the conduct at issue "always or almost always tend[s] to restrict competition and decrease output." *BMI*, 441 U.S. at 19-20. Here, to ask the question is to answer it: no competition existed in the relevant market between Shell and Texaco that could be restricted and thus no basis exists for *per se* treatment.

The Ninth Circuit's reliance on *BMI* and *NCAA* for its "necessity" ruling, Pet. App. 21a, turned those decisions on their head. In *BMI*, this Court did not ask whether the defendants' particular pricing strategy was "necessary" to achieve the venture's procompetitive purposes. Rather, it was enough that the defendants could not market the license without setting some price for it. In other words, an inherent part, or "necessary consequence," of the venture itself was that a price be established for the license. 441 U.S. at 21. The legality of the price-setting thus had to be evaluated in the context of the overall efficiency-enhancing venture of which it was part—not carved out for separate condemnation

unless the venture could prove that the particular pricing mechanism or the particular price selected was "necessary" as compared to some other possibility. This was true even though, unlike this case, the individual copyright owners had not fully integrated their operations and remained competitors with each other.

Similarly, in *NCAA* this Court did not evaluate the "necessity" of the NCAA's rule restricting the number of football games individual schools could televise. In rejecting *per se* treatment for what was clearly an output limitation (normally subject to *per se* treatment if agreed to by multiple firms), the Court did not require proof that the particular number of games set by the NCAA was necessary to the NCAA's purposes. Indeed, the Court did not require proof that any output restriction at all was necessary—and the Court's ultimate conclusion, after a rule of reason analysis, was that no output restriction was justified. The Court's application of the rule of reason to the NCAA's clear output limitation hardly supports applying the *per se* rule to an operational decision that by definition can have no competitive effect.

The Ninth Circuit also suggested that its "necessity" standard was proper under the ancillary restraints doctrine. Pet. App. 21a, 27a. This was wrong for two reasons. First, the ancillary restraints doctrine is not applicable here; the pricing decision that is challenged is an integral part of the venture, not something collateral to it. The ancillary restraints doctrine is generally traced to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). In describing the doctrine, the court there referred to restraints that limited competition among the venture members *outside of the venture*, principally covenants not to compete. *Id.* at 281; *see also Business Elecs.*, 485 U.S. at 729 n.3 ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market."). Later cases have similarly recognized that the doctrine applies to a

restraint that "is subordinate and collateral to a separate, legitimate transaction." *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986).

Here it makes no sense to ask whether the restraint was properly "subordinate" or "collateral" to a "separate" transaction. Pricing Equilon's output was inherently part and parcel of the venture itself as a production and marketing venture. By requiring that collateral restraints be reasonably necessary to the venture's success, courts ensure that venture participants do not use the venture as an excuse to restrain their otherwise independent conduct in ways unrelated to the venture. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908b, at 229 (2d ed. 2005) (doctrine protects against cartels being shielded "from the heightened scrutiny attending naked restraints by the simple device of attaching the cartel agreement to some other, independently lawful transaction"). Here, there was no otherwise independent conduct to restrain, because the venture had already eliminated all competition between Shell and Texaco in the relevant market.

Second, even if the ancillary restraints doctrine were relevant here, it is satisfied. Where that doctrine applies, the question it asks is whether the collateral restraint "promoted enterprise and productivity at the time it was adopted. *If it arguably did*, then the court must apply the Rule of Reason to make a more discriminating assessment." *Polk Bros.*, 776 F.2d at 189 (emphasis added); *see also Rothery*, 792 F.2d at 229 (an ancillary restraint is "one that is part of an integration of the economic activities of the parties and *appears capable* of enhancing the group's efficiency") (emphasis added). This standard is unquestionably met here. Equilon's pricing of its product did not simply contribute to Equilon's efficient operation; Equilon could not have operated at all as an integrated production and marketing

venture without setting some price for its product. There is thus no basis for condemning it as *per se* unlawful—or, indeed, for finding it unlawful at all.[17]

Contrary to the Ninth Circuit's ruling, there is no further requirement that the particular prices Equilon set be "necessary." No court applying the ancillary restraints doctrine (or any other standard under Section 1) has required a showing that the particular price selected by the venture be "necessary," whatever that might mean. The reason is obvious: Equilon (like any other entity producing and selling products) had to charge some price for its products. How is a court (or a lay jury) to determine whether one pricing strategy is any more or less "necessary" than some other strategy? How is a defendant to make such a showing? If in "setting each brand's price independently on the basis of normal market factors," Pet. App. 21a, Equilon had adopted a one cent differential between the brands, would that have avoided *per se* condemnation? What if the differential were three cents or if it varied by geographic area? And what relation does any of this have to determining whether the prices set by Equilon had any effect on competition? *Cf. Rothery*, 792 F.2d at 227 (rejecting contention that ancillary restraints doctrine requires that courts "calibrate degrees of reasonable necessity").

In rejecting *per se* treatment in *BMI*, this Court relied on the fact that the reach of such a rule would "be quite difficult to contain." 441 U.S. at 16. The court of appeals there had

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[17] As Professor Hovenkamp has stated, where a joint venture makes one or more products, those products "are jointly owned and cannot be sold without an agreement between the owners as to the price that will be charged for them." XI *Antitrust Law* ¶ 1908e, at 264. Accordingly, so long as the joint venturers do "not enter into any agreement to fix the price of their nonventure output," no charge of *per se* unlawful price fixing is legitimate. *Id.*; *see also id.* ¶ 1906d, at 239 ("[M]any forms of joint marketing require an agreement about the price to be charged.").

ruled that it was *per se* illegal for the defendants to issue a blanket license for a single fee. As this Court noted, however, under that theory, there is no reason why it would not be equally illegal for the defendants to set different fees for different purchasers. *Id.* at 16-17. Either way, the venture would be "fixing" the selling price for the joint product. Assuming that Section 1 has any application at all here, the Ninth Circuit's rule suffers from the same defect and must be rejected for the same reason.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does an agreement by two competing oil companies to fix prices through a joint venture, unrelated to any purpose of the joint venture, violate Section 1 of the Sherman Act under the *per se* rule or quick look rule of reason?

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STATEMENT OF THE CASE

Petitioners Shell Oil Company ("Shell") and Texaco Inc. ("Texaco") formed two joint ventures to refine and sell their brands of gasoline in 1998. The ventures introduced no new products. Agreeing that their brands of gasoline were to be treated equally, Shell and Texaco retained control over how the ventures marketed the brands.

Eight months after forming the ventures, Shell and Texaco agreed with each other to take pricing discretion away from the ventures and directed them to charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline. Although Shell and Texaco had justified the ventures by alleged cost savings (none of which were passed on to consumers), charging the same prices for the brands resulted in no cost savings or efficiencies, and was not reasonably necessary to achieve any legitimate purpose of the ventures. It also was immediately followed by large price increases in markets where the ventures had dominant shares.

The United States Court of Appeals for the Ninth Circuit quite properly held that a jury could find this conduct to be *per se* unlawful price fixing in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[1]

Now Shell, Texaco, and their various *Amici* ask this Court to ignore its decision in *Citizen Publ'g Co. v. United States*, 341 U.S. 593 (1969), and abandon over a century of antitrust jurisprudence by holding that simply because Shell and Texaco formed joint ventures, they could engage

[1] The court of appeals did not consider Respondents' alternative claim that the price fixing violated Section 1 under the "quick look" rule of reason.

in price fixing not integral to their ventures.[2] This has never been the law of this Court, and should not become so now.

1. Overview.

On January 1, 1998, Shell and Texaco combined marketing and refining assets in the western United States in a joint venture, Equilon Enterprises LLC ("Equilon"). Joint Appendix ("JA") 73 (¶ 6). On July 1, 1998, they did the same in the eastern United States through a second joint venture, Motiva Enterprises LLC ("Motiva"). JA 73 (¶ 7).[3] Equilon and Motiva marketed the Shell and Texaco brands of gasoline through licenses and Brand Management Protocols, which reserved overall control of brand marketing to Shell and Texaco and prohibited Equilon and Motiva from favoring either brand over the other. JA 77-78 (¶¶ 52-56).

Until September, 1998, Equilon and Motiva set separate and distinct dealer tankwagon prices for the Shell and Texaco brands of gasoline through their own

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[2] Shell and Texaco repeatedly refer to their ventures as "lawful." Respondents, however, have never conceded the lawfulness of the joint ventures, nor has this issue ever been litigated. To the contrary, the complaint alleges that each joint venture was formed by Shell and Texaco with the purpose of fixing "prices between themselves on gasoline sold to the independent Shell and Texaco branded dealers." Joint Appendix ("JA") 23, 24 (¶¶ 80, 84). The complaint further alleges that the joint ventures were unlawful combinations to fix prices in violation of Section 1 of the Sherman Act. JA 28 (¶ 108).

[3] A third owner was Saudi Refining, Inc. ("SRI"), with which Texaco operated another joint venture, Star Enterprise, which became part of Motiva. JA 72 (¶ 4). SRI, originally a defendant, obtained summary judgment on the issue of Respondents' standing, a ruling not before this Court.

pricing departments, as Shell and Texaco had done before the ventures. JA 78 (¶¶ 55-56); Deposition of Richard Broderick, pp. 24-44.[4] At that time, Shell and Texaco agreed to require Equilon and Motiva to set the same price for the Shell and Texaco brands. 3 Record at 509-85.[5] Under the new pricing policy, dealer tankwagon gasoline prices immediately rose precipitously while the price of crude oil was falling to its lowest level since the Depression. 3 Record at 490, 586-87; 4 Record at 735-38.[6]

On June 15, 1999, Respondents, independent Shell and Texaco dealers in California, sued Shell and Texaco in the United States District Court for the Central District of California. JA 1; 1 Record at 2.[7] Respondents claimed that the agreement to fix the same price for the brands violated Section 1 under either the *per se* rule or the quick look rule of reason. After discovery and denial of a motion to dismiss

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[4] The entire deposition of Mr. Broderick is attached as Exhibit J to the Supplemental Declaration of Andrew C. Finch in Support of Defendants' Motion for Summary Judgment filed under seal in the district court on October 5, 2001 (Lower Court Docket Nos. 148-150). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[5] References to ___ Record at ___ are references to Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals on December 13, 2002. The initial number is the volume number, and the final numbers are specific page numbers in the Excerpts of Record.

[6] Exhibits 336 and 337, CDs containing dealer tankwagon and crude oil pricing data are attached at Tabs 36 and 38 of the Declaration of Daniel R. Shulman in Support of Plaintiffs' Motion for Partial Summary Judgment, Volumes 3 and 4, filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 128-131). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[7] Respondents brought suit on behalf of themselves and a class of all Shell and Texaco dealers in the United States. The issue of class certification has not been litigated and remains to be decided in the district court after this matter is remanded.